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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 v.

17-cr-548 (JMF)

5 JOSHUA ADAM SCHULTE,

6 Defendant.

Conference

7 -----x

8 New York, N.Y.
9 November 8, 2021
2:30 p.m.

10 Before:

11 HON. JESSE M. FURMAN

12 District Judge

13
14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
Southern District of New York

17 BY: DAVID DENTON, JR.

MICHAEL D. LOCKARD

18 Assistant United States Attorneys

19 JOSHUA ADAM SCHULTE

Defendant Pro Se

20 SABRINA P. SHROFF

Standby Attorney for Defendant

21 -and-

22 COLSON LAW PLLC

Standby Attorneys for Defendant

23 BY: DEBORAH A. COLSON

24 Also Present: Daniel Hartenstine

Classified Information Security Officer

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1 (Case called)

2 THE CLERK: Counsel, please state your name for the
3 record.

4 MR. DENTON: Good afternoon, your Honor. David Denton
5 and Michael Lockard for the government.

6 THE COURT: Good afternoon.

7 MR. SCHULTE: Josh Schulte, appearing pro se.

8 THE COURT: Good afternoon, Mr. Schulte.

9 MS. SHROFF: Good afternoon, your Honor. Sabrina
10 Shroff and Deborah Colson, standby counsel.

11 THE COURT: Good afternoon to you as well.

12 Mr. Schulte, if you could please pull your mask up to
13 make sure it covers your nose and mouth, that would be great.

14 First of all, let me introduce myself. I think
15 everybody other than Mr. Schulte certainly knows who I am. But
16 I'm Jesse Furman, the new district judge assigned to this case,
17 which means that I will be the judge who would preside over any
18 future trials and, in the event that you are convicted or the
19 convictions in trial number one stand, I will be the judge who
20 would sentence you.

21 The purpose of today's proceeding is to just, really
22 for me, to get a handle on where things stand, possibly to rule
23 on some pending motions, and generally get things sort of more
24 organized, I suppose, and possibly even set a trial date for
25 the second trial.

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1 Now, I want to remind everybody that we are in an
2 unclassified setting, so you should restrict anything you say
3 to unclassified matters. The court information security
4 officer, Mr. Hartenstine, and his colleagues are present, and I
5 will consult them as needed.

6 Now, let me start with just a couple housekeeping
7 matters. First, I think there are a number of lawyers that
8 appear on the docket. Can I confirm with the government and
9 the standby counsel that you're the only lawyers who are
10 currently on this matter and that we can terminate everyone
11 else?

12 MR. DENTON: That's true for the government, your
13 Honor.

14 THE COURT: Ms. Shroff?

15 MS. SHROFF: Your Honor, Ms. Colson and I are standby
16 counsel assigned by Judge Crotty.

17 THE COURT: All right. Can you maybe pull the
18 microphone closer to you, and I have found that if you remain
19 seated and speak directly into the microphone, that's more
20 effective with the masks.

21 But, Ms. Shroff, are there any additional -- are you
22 the only standby counsel; is that correct?

23 MS. SHROFF: No. Me and Ms. Colson are standby
24 counsel.

25 THE COURT: I know. Are you and Ms. Colson the only

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1 standby counsel?

2 MS. SHROFF: Yes. Yes.

3 THE COURT: Thank you. I just wanted to clarify, so
4 we can terminate everyone else that appears on the docket.

5 Second, Mr. Denton, can you just tell me where the
6 speedy trial clock stands and how many days remain on the
7 clock?

8 MR. DENTON: Your Honor, I don't think any time has
9 been run off the clock. I think time has been consistently
10 excluded since the beginning of the case except for time
11 periods like the present from October 25th to the present when
12 time is tolled automatically by the pendency of motions in this
13 case.

14 THE COURT: All right. Mr. Schulte or standby
15 counsel, anybody have a different view of that or wish to be
16 heard?

17 MR. SCHULTE: Yeah. I disagree with that. I think,
18 especially, initially after the first trial ended, the time,
19 from my understanding of the Speedy Trial Act, is that pretrial
20 motions are excluded but not post-trial motions, so there was
21 some attempt to exclude time due to post-trial motions that I
22 don't think was appropriate. And in other issues where time
23 was excluded, my counsel had disagreed with those -- with -- at
24 the time for those.

25 THE COURT: All right. Well, duly noted, and if there

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1 is any application or motion on that front I will certainly
2 take it under advisement. At the moment I would be inclined to
3 agree with the government that time is automatically excluded
4 by virtue of the pending motions. And I think a number of
5 those motions have been pending for a period of time or, you
6 know, over a course of time have been filed. So in any event,
7 I will table that for some later date.

8 I did want to hear from the government in the first
9 instance regarding the current conditions in the MDC with
10 respect to Mr. Schulte's access to a law library, his access to
11 the laptop and other things that he needed to access discovery
12 and the like. I don't know if you've had an opportunity to
13 contact anyone at MDC or find out what the situation is. But I
14 obviously want to ensure that, notwithstanding his transfer,
15 that he is able to access and continue working in whatever
16 manner he needs to prepare for trial.

17 MR. DENTON: Your Honor, we haven't had a chance to
18 consult with the Bureau of Prisons. We've been advised that
19 the inmates who are under special administrative measures at
20 the MDC have had access to law library resources since last
21 Friday.

22 We also understand that, with the exception of a brief
23 period sort of immediately after the defendant's transfer, he
24 did have access to his laptop, which does require charging in
25 the unit manager's office, I think. The unit manager has been

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1 doing that. And he's had access to it since that time.

2 THE COURT: All right. So your understanding is that
3 the issues raised by standby counsel in the letter at ECF
4 no. 571, that those issues have been resolved, at least for the
5 time being?

6 MR. DENTON: Yes, your Honor.

7 THE COURT: All right. Mr. Schulte.

8 MR. SCHULTE: So for the law library issue, ever since
9 I was moved to MDC on the 17th or 18th, I've not had access to
10 it. So I still at this time have never been to any law library
11 or discovery review.

12 The laptop had been -- has been charged. However,
13 I've been unable to review discovery due to the fact that the
14 hard drives require external power that I do not have and I've
15 not been to the law library, as well as issues with the DVD
16 drive that I still do not have. And I would request -- I've
17 moved for this before, for the government, but this time I want
18 to make it clear that, in the past, I had a previous laptop in
19 which the government sent me multiple CDs and DVDs with
20 programs, such as forensic programs, video-viewing programs,
21 and other programs for being able to dissect and review the
22 discovery.

23 In addition, I have had multiple CDs sent to me both
24 by the government and by my attorneys that have had discovery,
25 as well as attorney-client confidential information. The new

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1 laptop that I purchased, most new laptops don't have DVD
2 drives, and so I have been requesting this external DVD drive
3 for a very long time now. And I still, I still do not have it,
4 so I cannot review forensics and other important information.
5 So I just wanted to request this DVD drive.

6 And on the same topic for the DVD drive, Judge Crotty
7 previously -- I requested with him permission with the court
8 for me to file letters and motions by putting them on blank CDs
9 and mailing them to the court on PDFs. Judge Crotty permitted
10 this. But we were never able to actually do that because I
11 didn't have a DVD drive or CDs, and I was wondering if the
12 Court would be open to that, since at MDC I haven't have access
13 to a printer, and the easiest way for me would be to just burn
14 it to a CD, mail it to the Court.

15 THE COURT: All right. First of all, if you could
16 please put your mask over your nose, I would appreciate it.

17 MR. SCHULTE: I think it's falling off.

18 MS. COLSON: The mask is too large on you.

19 MR. SCHULTE: I might need another one.

20 THE COURT: All right. Well, I don't know if there's
21 another one available. But given that we have a mask rule, it
22 does need to be on.

23 I take it the marshals don't have another one; is that
24 correct?

25 A MARSHAL: Sorry, your Honor.

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1 THE COURT: My deputy is going to go look for
2 something.

3 Mr. Denton, I don't know if you can respond to any of
4 that. Obviously, some of these issues are coming up for the
5 first time for my purposes, so I need to familiarize myself
6 with them. But can you tell me what the story is with this DVD
7 drive, with filing things in that manner, so on and so forth?

8 MR. DENTON: In part, your Honor. We'll have to
9 follow up on the DVD drive. Defense counsel had previously
10 provided us with an external disc reader, which we in turn
11 provided to the MDC. They confirmed that they had received it,
12 and it was our impression that it had been delivered to the
13 defendant, but we can certainly follow up and find out why that
14 isn't the case.

15 With respect to filing things, I think one of the
16 issues is going to be that, as a matter of BOP policy, the
17 defendant is not allowed to have blank CDs or unmarked CDs. He
18 can have marked discovery CDs, things like that. So I'm not
19 sure whether it's going to be possible for him to have the
20 blank CDs. I think it's a matter of the efficiency or the
21 mechanics. We don't have a dog in that fight and we defer to
22 the Court on whatever the Court believes to be the most
23 effective way for the defendant to make his filings going
24 forward.

25 THE COURT: And do you know -- Mr. Schulte indicated

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1 that Judge Crotty had indicated that he would be OK with
2 proceeding in that manner. Do you know if that's accurate or
3 where that appears on the docket?

4 MR. SCHULTE: So --

5 THE COURT: Hold on, Mr. Schulte. I'm just asking
6 Mr. Denton.

7 MR. SCHULTE: Oh, I'm sorry.

8 MR. DENTON: Your Honor, I know that was discussed.
9 I'm not sure we ever got to an implementation point, and I
10 don't think an order was ever entered to that effect.

11 THE COURT: Mr. Schulte, can you point me to something
12 on the docket?

13 MR. SCHULTE: I'm sorry. I just had an email from the
14 district court, from his deputy, discuss -- basically saying
15 that the court allows that to proceed.

16 As far as the blank CDs, from my understanding with
17 the BOP, they returned most of those, and when I inquired about
18 that, they didn't seem to be opposed. I received other CDs and
19 DVDs from standby counsel that have been blank that they
20 haven't objected to. So I don't know if that's the policy at
21 the BOP or not.

22 THE COURT: All right. So let me say a couple things.
23 First of all, Mr. Denton, I want you to look into the issues
24 that Mr. Schulte has mentioned with respect to the DVD, with
25 respect to the need to charge and the external hard drive. I

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1 do not want those sorts of things to be delaying this
2 litigation. I want to resolve those issues. I want to ensure
3 that Mr. Schulte has access to whatever he's entitled to and
4 that there are no technology or, you know, logistical hurdles
5 that prevent him from preparing for trial. So I'm going to
6 request that you look into that, speak to folks at the MDC.
7 You can tell them that if it's not resolved soon, that they'll
8 hear from me and either will have to come here or I'll be in
9 touch. But hopefully you can get to the bottom of it and
10 ensure that he has whatever he needs to have.

11 Now, I want a letter from you on that score, let's say
12 by next Monday, filling me in on where that stands and what he
13 does have, what he doesn't have. And to the extent that he has
14 raised anything in particular, you know, if there are any
15 restrictions and he can't have that, I want to know what those
16 are. All right?

17 MR. DENTON: Yes, your Honor.

18 THE COURT: All right. Thank you.

19 MR. DENTON: Just briefly with respect to the external
20 hard drives, we also discuss at one point when this came up in
21 the past that the government would be willing to reproduce the
22 contents of those hard drives on new hard drives that do not
23 require external power. So if the defendant or standby counsel
24 would prefer to go that route, we're still happy to do that.
25 But we will nevertheless make appropriate inquiries at BOP.

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1 THE COURT: All right. I'm agnostic as to whether
2 it's better to do that or fix whatever the problem is, but
3 whatever it is, I want to make sure that we have a path forward
4 and this isn't hindering Mr. Schulte's preparations for trial.
5 And to the extent that issues in this -- this is a general
6 proposition -- to the extent that issues of this sort have been
7 litigated before and there are relevant orders or prior
8 submissions that are relevant, definitely make a point of
9 pointing them out to me. Don't presume that I will know or
10 remember or be able to find them. So if Judge Crotty has
11 issued any rulings that are relevant to these or any other
12 issues, definitely make sure you educate me about that.

13 On that score, Mr. Schulte, I'll leave it to you and
14 standby counsel. If you wish to renew the request to submit
15 things by DVD or CD and you have the capacity to do that, you
16 can make a new request. If there is any prior correspondence
17 or ruling from Judge Crotty that is relevant to that, you
18 should certainly bring it to my attention. But I'll give you
19 an opportunity to make that request. And I will certainly
20 consider it in due course. But talk to your standby counsel,
21 and then you can make whatever request you think is appropriate
22 on that score.

23 All right. Any other sort of practical issues of that
24 sort to address before we turn to the pending motions?
25 Mr. Schulte?

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1 MR. SCHULTE: Yes. There were, I think, two other or
2 three other discovery-related issues I just wanted to -- two or
3 three other discovery-related issues, and then I had some
4 additional MDC issues as well. Do you want me to --

5 THE COURT: Go ahead.

6 MR. SCHULTE: Do you want me to discuss -- so the
7 discovery -- for the discovery, Judge Crotty entered an order
8 September 23, 2021, docket 513. He ordered the government to
9 produce the forensics from server Serve-02 and desktop SC01 to
10 me by October 6.

11 So what these -- these computers were seized pursuant
12 to a search warrant five years ago and were never produced to
13 the defense for five years. And so now the government is
14 saying that they have to be produced in the SCIF for review,
15 due to the fact that one of them has documents from the
16 internet on it, from the Snowden document, so the whole server
17 is tainted. And then the desktop as well.

18 So Judge Crotty ordered the government to produce
19 those October 6. The government never did. And to my
20 knowledge, to this day, they still have not produced those.

21 THE COURT: All right. Stop there.

22 Mr. Denton?

23 MR. DENTON: So that's not accurate, your Honor. The
24 government previously produced both of them on a single hard
25 drive. One server contains classified information. The other

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1 server contains child pornography, which is subject to certain
2 handling restrictions. As a result, that hard drive was
3 maintained in a special safe in the SCIF consistent with those
4 handling restrictions. At some point, there was an error, or a
5 fault, with the safe. And so the hard drive had to be removed.
6 And for a period of time I think it was maintained by the
7 classified information security officer. My understanding was
8 that it had since been returned, there was a new safe, and that
9 they -- that the hard drive had been returned to where it was
10 previously.

11 THE COURT: OK. So, Mr. Schulte?

12 MR. SCHULTE: Yes. So this was discussed before in
13 front of Judge Crotty, and my -- my standby counsel can talk to
14 this issue, but the government basically produced it, to my
15 standby counsel. He didn't have a combination, didn't know
16 about it. And the whole time they never opened the safe. They
17 never took it out. I never reviewed it. They never reviewed
18 it. So the fact that the government says it was produced,
19 maybe it was, but my standby counsel didn't have the
20 combination, never opened it, and that's actually what ended
21 up -- how the safe ended up breaking is because it was never
22 opened.

23 THE COURT: Mr. Schulte, I'm not so interested in the
24 past. It sounds like Mr. Denton said that they have complied
25 with Judge Crotty's order and that you now have access to it.

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1 Do you have any reason to disagree or --

2 MR. SCHULTE: Yes. Just, unless the CISO knows that
3 it's been produced. But to my knowledge, since I've been in
4 this, obviously the last few weeks I haven't been to the SCIF,
5 but since October 6 at least two other SCIF times I went and I
6 did not find it there. My standby counsel didn't see it
7 either. And I asked the CISO, and to my knowledge it's still
8 not --

9 THE COURT: All right. Mr. Hartenstine?

10 MR. HARTENSTINE: Your Honor, the drive is currently
11 in a small two-door safe, distinguishable from the other safes
12 inside of the SCIF in the type, and the combination to that
13 SCIF is set to a combination that's been shared with the FBI,
14 so that an agent, in consistence with my understanding of the
15 policy for child-pornography-related material, that the FBI can
16 open the safe for Mr. Schulte during his SCIF sessions.

17 THE COURT: All right. Very good.

18 Well, Mr. Schulte, it sounds like that issue has been
19 resolved. I trust that you and through your standby counsel
20 will coordinate with the CISO and the FBI to make sure that you
21 can access this. But it certainly sounds like it has been
22 produced and it is in the SCIF. Obviously let me know if that
23 turns out not to be the case, but --

24 MR. SCHULTE: So the -- I thought only one -- my
25 understanding from the Court's previous order is that the

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1 server itself, there is no need for it to be produced -- or to
2 be locked into the cabinet, because there's no -- no reason for
3 that. It's the Snowden documents. Right? So that one should
4 not be in the safe. Correct?

5 MR. HARTENSTINE: That's correct.

6 THE COURT: Mr. Schulte, you speak to me.

7 MR. SCHULTE: Oh, I'm sorry.

8 THE COURT: If I choose to direct a question to
9 Mr. Hartenstine I will, but speak to me and not to him.

10 Mr. Hartenstine.

11 MR. HARTENSTINE: I apologize, your Honor. That is
12 correct. There are two separate drives that were contained on
13 one hard drive previously, and one of those drives, in my
14 understanding, contains the child-pornography material. The
15 other drive, which has been referred to as the Snowden drive,
16 does not. However, because they were both combined onto one
17 drive, I think they have both been subject to the storage
18 requirements.

19 THE COURT: All right. Well, I don't know if
20 that's -- I guess that would have to be -- see if that's
21 necessary. If there are undue restrictions, so to speak, on
22 the child-pornography drive, for lack of a better way of
23 describing it, that wouldn't necessarily have to provide to the
24 other and there's a means of providing those to Mr. Schulte so
25 that he can use them more readily, I think we should get that

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1 done. But --

2 MR. DENTON: If I may, your Honor, when the drive was
3 returned to the SCIF, we did that. We split the two servers
4 onto two different hard drives. So there is one that is
5 classified and has to remain in the SCIF and one that has to
6 remain in the SCIF subject to the child-pornography handling
7 requirements, but they should now be separated onto two
8 different drives.

9 THE COURT: And your belief is that the first one is
10 classified, though?

11 MR. DENTON: Yes, your Honor.

12 MS. SHROFF: I apologize, your Honor. Did Mr. Denton
13 say should be split or should not be split?

14 THE COURT: I believe he at least was intending to say
15 or communicate that they have been split and that they are now
16 on two different drives.

17 MS. SHROFF: OK. Thank you.

18 THE COURT: So it sounds like this may be a non-issue.
19 Why don't you and standby counsel try to get to the bottom of
20 it, try and work with the CISO he and/or the government, but it
21 sounds like it should be available to you and hopefully that
22 issue is resolved.

23 What's next, Mr. Schulte?

24 MR. SCHULTE: The other issue -- two -- the SCIF, it
25 sounds like, may be resolved. And then the other issue --

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1 well, we can come back to discuss that. The other issue is,
2 Judge Crotty, one of his last orders was an electronic copy of
3 the docket to be produced, basically the whole docket
4 downloaded with all the different attachments and stuff so that
5 I could access that material. And I don't have that yet.

6 THE COURT: So could be wrong because I'm reading a
7 lot and trying to get up to speed on everything, but I was
8 under the impression that the government had filed a letter
9 indicating that that had been provided. Is that incorrect,
10 Mr. Denton?

11 MR. DENTON: So, your Honor, I think that goes with
12 the DVD drive. We provided both of those together, and, again,
13 it was our impression that those had been provided by the MDC
14 to Mr. Schulte. We'll follow up on that as well.

15 THE COURT: All right. So why don't you address that
16 in your letter to me by next Monday.

17 Mr. Schulte, anything else?

18 MR. SCHULTE: So the SCIF, so I know the Court has
19 issued several orders, and I received them all today. You
20 know, it takes me a long time to actually -- before I receive
21 mail, but my standby counsel provided a lot of it to me today.
22 I wasn't able to go through all of this, but they read some of
23 this, the things, to me.

24 But before, in the SCIF, I was having issues where I
25 was missing over 50 percent of the SCIF days, not being able to

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1 be produced there.

2 And I also wanted to let the Court know that, two
3 weeks ago, I sent several letters to the Court. And I didn't
4 know yet -- your order dated October 28, I did not see that
5 yet. So there is potentially four or five letters from me
6 coming in at some time to the Court that addresses the SCIF and
7 some other issues. But from my understanding, there's been
8 some rulings that you issued about the SCIF. So some of this
9 may be resolved. But the issue was, just before I was supposed
10 to go, at least two times --

11 THE COURT: Let me interrupt for a second, because let
12 me tell you where things stand and perhaps that will moot some
13 of what you have to say.

14 MR. SCHULTE: OK.

15 THE COURT: I certainly understand that access to the
16 SCIF has been an ongoing issue and I am hoping that we can and
17 will resolve it. To that end I called the U.S. marshals
18 themselves to discuss this, and underscored the importance of
19 ensuring that you have an adequate amount of time in the SCIF
20 and its necessity to get this case to trial. He looked into
21 it, got back to me, and basically committed to providing two
22 SCIF days, eight hours per day, so I guess double per what was
23 the baseline to date, going forward, and provided a contact in
24 the marshal service for counsel to coordinate with, and a
25 schedule of days for the next month. And my understanding is

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1 that that will then be done on a month-by-month basis going
2 forward, that they will basically provide the days in advance
3 and it should be two days per week, eight hours per day, and
4 that way, you know, substantially more than you've had to date.

5 Having said that, I also know that Judge Crotty
6 entered an order indicating that when a trial date is set --
7 and, again, my intention is to do that today -- that the
8 parties should confer and try and figure out appropriate terms
9 for increased SCIF time as the trial approaches to ensure that
10 you have an adequate amount of time to prepare. And I'm
11 certainly prepared to do what I need to do to ensure that that
12 happens as well.

13 So, again, without needing to necessarily dwell on
14 things in the past, my hope is that that puts things on a
15 better path going forward. But I don't know if, having heard
16 that, you have anything you wish to say, but hopefully that
17 will work.

18 MR. SCHULTE: Yes. So thanks, Judge. That additional
19 time, especially in the missed SCIF days, would be great. One
20 of the issues too -- it sounds like maybe they would -- my
21 standby counsel and the marshals and everyone would discuss,
22 because one of the other issues too was the timing. But it
23 sounds like we could probably discuss that without your
24 intervention. But I know that since the marshals had to take
25 me separately before, what they had to do was, the marshals had

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1 to wake up at like 2 a.m., pick me up at 4 a.m., for me to sit
2 over here for like seven hours before it started. So it ended
3 up wasting a whole bunch of time for all that. But the
4 eight-hour day is, I think, if we can just optimize -- my
5 standby counsel can optimize with the marshals and the time,
6 setting up the time, so, you know, the timing is OK. And if it
7 ends up cutting into the time or a little bit later, something,
8 it's not a big -- not a big deal.

9 THE COURT: Very good. Needless to say, I would like
10 to avoid having to be personally involved in the, you know,
11 actual mechanics of it. But I will make sure that you have an
12 adequate amount of time and that generally speaking there
13 aren't big-picture issues. But I certainly expect that counsel
14 will coordinate with one another and with the marshals to
15 actually get it done, whatever that may mean.

16 All right. So hopefully that will help going forward.

17 Any other issues of that nature, Mr. Schulte?

18 MR. SCHULTE: I think that was the last issue with the
19 discovery. My next issues, whenever the Court -- or with the
20 Court's permission would be discussing some issues, some MDC
21 issues related to confinement.

22 THE COURT: All right. Why don't we talk about that
23 now and get those out of the way, and then we can talk about
24 the pending motions. So go ahead. Tell me about that.

25 MR. SCHULTE: All right. So the first thing regarding

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1 the MDC issues I wanted to bring to the Court's attention is,
2 there's three major issues going on at the MDC that we've been
3 trying to resolve for the last two to three weeks, and it's
4 about sleep deprivation, not being fed, and issues with the
5 temperatures. So those are the three major issues.

6 And the first one, for the sleep deprivation, is, the
7 most units in general population have lights that turn off and
8 turn off. The MDC spent taxpayer dollars to modify our unit,
9 which was a general population unit, to install bright lights
10 that burn 24/7. And these lights prevent, prevent sleep. And
11 it's -- they're arbitrarily imposed. There's no reason to
12 install these 24/7 bright lights.

13 In addition to the lights, the MDC has mandated that
14 the corrections officers at MDC make rounds at night five times
15 more than general population. So every ten minutes they come
16 by. There's a little window to the -- to -- on our door that
17 they open to look in and then they slam it shut. So it's
18 always (gesturing) -- every ten minutes, you're hearing this
19 banging. And so I wanted to request that the Court basically
20 order the 24/7 bright lights to be removed back to the situ --
21 the way it was before.

22 And then for the, the doors that are being slammed, at
23 MCC they have rubber around these doors so that if it slams it
24 would just swing back at the officer. So I would ask that the
25 MDC just implement this same policy, not have them slam it.

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1 And then for the rounds that the officers are making, there's
2 no reason that they shouldn't make the same number of rounds as
3 everyone else through general population.

4 THE COURT: All right. The food issue?

5 MR. SCHULTE: So the food issue is, we're no longer
6 receiving three regular meals a day. Actually on Saturday we
7 didn't get breakfast. When they fed us at 12:30 for lunch I
8 got a -- I only got a piece of bread. And I didn't get dinner.
9 And this isn't the first time that I only had one meal a day.

10 The other times when we are receiving the food, it's
11 about 10 percent of what we had at MCC. They are little
12 bite-size trays that are half a piece of paper, not including
13 the margins, split up, and barely any food in them. And I
14 know, I was at MDC before so I know the trays and the food that
15 they gave to general population, and we're not -- we're not
16 getting the same trays, the same amount of food as general
17 population is getting.

18 So I wanted to ask the Court to compel the MDC to feed
19 us three times a day, same as general population, at the same
20 times they feed general population, which is generally 7 a.m.,
21 11 a.m., 5 p.m., and to provide us the exact same food as
22 general population and the exact same trays, the same amount.

23 And also double trays. When we were at MCC this was
24 what they did, because general population has the ability to
25 get seconds. So while we were at MCC they provided us two

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1 standard trays, the same trays --

2 THE COURT: All right. Mr. Schulte, I'm not going to
3 get into the business of ordering the MDC to give you seconds
4 of meals on that level of detail. That's just not what my job
5 entails. They run the jail and I'm not going to run it for
6 them.

7 Having said, I certainly want to ensure that you're,
8 you know, not, again, having trouble preparing for trial and
9 generally being treated in a civilized manner. But if it gets
10 into that level of, you know, micromanagement of their
11 business, that's not what I'm here for.

12 So what's the third issue, is temperature regulation,
13 you said?

14 MR. SCHULTE: Yeah. So when we were at MCC they
15 didn't provide heat in the winter. The officers wore like
16 three different ski jackets. And when they first took us to
17 MDC we were on the SHU and there was heat flowing in. You
18 know, we are just wore regular -- I just wore a regular shirt.
19 But then they moved us to the special area that they had for
20 us, there's no heat, and I'm constantly wearing like three,
21 three pairs of thermals, multiple sweatshirt and pants and like
22 four blankets, just to keep warm. Now the last few days it's
23 been a little warmer outside. But I just wanted to ask that
24 the MDC just provided the same amount of heat as they're
25 providing general population.

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1 THE COURT: All right. Mr. Denton, any reactions,
2 thoughts? Do you want to check with the MDC about some of
3 these issues and include it in your letter next Monday? Again
4 mindful that I'm not going to involve myself in micromanaging
5 what BOP is doing, but I do want to make sure that Mr. Schulte
6 is being treated in a human manner and able to prepare for
7 trial.

8 MR. DENTON: Yes, your Honor. This is the first we're
9 hearing of most of this at the MDC. We'll inquire and report
10 back to the Court.

11 THE COURT: All right. Thank you. So I'll look for
12 that in a letter next Monday and we'll take it up as needed.

13 Now, is that it, Mr. Schulte?

14 MR. SCHULTE: So those are the major issues. Now, for
15 the other issues, I don't know if the Court would prefer me to
16 write a letter or a motion to address them instead of
17 addressing them here? Most of it is essentially arbitrary
18 things that they've done. For example, everyone at MDC, when
19 they go to recreation outside, they have basketball courts.
20 For us, when we go outside, they literally took the basketball
21 goals down and took our balls away so we couldn't, you know.
22 So it's arbitrary things like this that's not really -- it's
23 just petty kind of things that -- it's arbitrary. It shouldn't
24 be applied.

25 THE COURT: All right. Mr. Schulte, you're welcome to

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1 submit it in writing if you wish. I just would ask you to make
2 sure that, if it doesn't rise to the level of something that
3 involves basically humane treatment, you know, minimum
4 civilized humane treatment, or interfere with your ability to
5 prepare for trial, I'm not really going to be interested in it
6 and you're not likely to get anything from me on it. If it's a
7 question of how many basketballs you're getting or whether
8 you're entitled to seconds of a meal, it's just not something
9 that I'm concerned with. If it pertains to your, you know,
10 civilized treatment, I'm concerned with it. If it pertains to
11 your ability to prepare for trial in this case, I'm concerned
12 with it.

13 So with that proviso, you're certainly welcome to put
14 anything you want in the letter to me and I will take it under
15 advisement and we'll deal with whatever we need to deal with.
16 All right?

17 MR. SCHULTE: OK.

18 THE COURT: All right. One practical question. Given
19 that Mr. Schulte is representing himself, I don't know; do I
20 need to, in my orders, indicate -- I guess the question is, how
21 do orders get to him? Is that standby counsel's
22 responsibility? Do I need to direct that the government serve
23 him? How does that work?

24 MR. DENTON: So, your Honor, that's actually something
25 that is a little bit in flux right now. The defendant had been

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1 having issues with receiving court orders and other legal
2 correspondence in general at the MCC. As an interim solution,
3 what we were doing was, the government was providing copies of
4 court orders and government filings to the MCC legal
5 department, who were in turn hand-delivering it to the
6 defendant. As of today, the MDC advised us that they now
7 believe that they're in a position to handle those things
8 through the regular mailroom delivery process, that they have
9 significantly more staff than they did at the MCC, and who are
10 better trained, and so they're no longer going to provide the
11 kind of hand-delivery that we were doing before. We obviously
12 stressed to them that, particularly given that Mr. Schulte is
13 representing himself, it is essential that he receive court
14 orders in a timely fashion and that the 14-day specification in
15 the special administrative measures for delivery of mail really
16 was not going to work, for things like court orders. They
17 advised us that they understood that and would convey the
18 seriousness of it, and we explained we would let the Court know
19 about the change in process.

20 THE COURT: OK. I will say I've heard, in cases with
21 fewer complications than this, about referring complaints about
22 the delays in the delivery of mail and legal mail in particular
23 that we see. I certainly understand that they are screening
24 for certain things and trying to make sure that things don't
25 get to prisoners. I get that. But I do want you to underscore

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1 to them that I don't want there to be any undue delays in the
2 delivery of legal mail for Mr. Schulte, let alone of any orders
3 that I issue, to keep this case on track. You know, it's just
4 not going to be feasible if there are multi-day or multi-week
5 delays between issuing things and actually getting them to him.

6 MR. DENTON: We have done that and will continue to,
7 your Honor.

8 We also reiterated to them that it was entirely
9 possible that the Court would order us to continue the
10 hand-delivery process. So if for whatever reason the MDC's
11 preferred regular mail delivery is not working, they're upon
12 notice that the Court may intervene.

13 THE COURT: All right. Well, why don't we see if it
14 works. If there's a problem, then I'm not averse to entering
15 an order directing them to do something different. But see if
16 it works in the normal course first.

17 Ms. Shroff, did you have something you wanted to say
18 on that?

19 MS. SHROFF: Yes, your Honor. So I think the part --
20 your docket entry -- this is 570.

21 THE COURT: Can you speak into the microphone.

22 MS. SHROFF: Sorry. So it's docket entry no. 570.
23 The Court on October 28th ordered defense counsel and the
24 government to mail the order that the Court had issued to
25 Mr. Schulte. So I sent a copy. I know Ms. Colson, I believe,

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1 sent a separate copy. And I believe the government must have,
2 because I'm just assuming they complied with the order.

3 Mr. Schulte has still never received that order. Right. So
4 I'm just -- I'm sure Mr. Denton will do all he can. I have no
5 reason to doubt it. But I just wanted the Court to know that
6 he has to date not received that order. Ms. Colson and I read
7 it to him word for word. That's one problem that we have.

8 The second problem that Mr. Schulte continues to have
9 is that, despite many requests, he does not get a legal call.
10 So, for example, on the week that the SCIF was canceled, we
11 were not able to get a legal call put into place because we
12 don't have the same amount of notice. He couldn't get a legal
13 call out to us. And Mr. Schulte can speak to that more
14 directly if he wants.

15 But if the Court would just help us on these two
16 matters, because we are at a huge disadvantage on this
17 otherwise. We just can't get work to him.

18 And also, if he is pro se and we are mailing him
19 things and he's simply not getting them, that is contributing
20 to his, I would say, rightful dismay at how we're handling our
21 mailing obligations. So I'm just putting it out there for the
22 Court because I worry that it's going to become a bigger and
23 bigger issue.

24 THE COURT: Well, I worry that it's going to become a
25 bigger and bigger issue too. So for that reason I will

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1 certainly stay on top of it. Let's see how things go with the
2 new procedures. But it doesn't bode well that he has yet to
3 receive a mailed copy of the OK 28th order. Assuming that was
4 mailed promptly after it was entered, it's been, I think, 11
5 days, and that doesn't make me optimistic.

6 So, Mr. Denton, you're welcome to convey that when you
7 speak to folks there this week and say that, you know, I'm not
8 going to let that go on. And if it does continue to happen
9 we'll come up with a different plan, but hopefully they can
10 make it work.

11 Ms. Shroff, as for the second issue, is there
12 something in particular that you would propose or request?
13 Obviously I don't know what's been going on to date, in terms
14 of attorney calls, but --

15 MS. SHROFF: Just so that if he -- if Mr. Schulte
16 requests a legal call, we just ask that the MDC provide him
17 one. Apparently he was told that there wasn't adequate staff
18 or whatever it is that Mr. Schulte was told, that he couldn't
19 get a call in several times, not this week, but the week
20 before, to even get a call. He got one call. And last week
21 apparently he tried to call us because he wasn't taken to the
22 SCIF. He didn't get a call at all.

23 So to the extent that somebody could actually give him
24 a legal call when he requests one, that would be appreciated.
25 Thank you.

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1 THE COURT: Mr. Denton, you could certainly convey
2 that as well. I think we need to give MDC a little bit of time
3 to see if they can sort things out between the influx of new
4 inmates from the MCC, additional security issues pertaining to
5 Mr. Schulte, COVID, you know. There are a lot of issues going
6 on that certainly don't make it easy to comply with each and
7 every request. That being said, I certainly agree that
8 Mr. Schulte needs to have the means to communicate with standby
9 counsel, and that's essential to ensure that he understands
10 what's going on, that he understands when I have entered an
11 order and so forth. So let's keep our fingers crossed if there
12 are ongoing issues, and if there are I will address them.

13 All right. Let's talk about more substantive things.
14 In my order of October 28th that Ms. Shroff indicates she's --
15 they've read to Mr. Schulte, I had listed what I understand to
16 be the pending motions, and asked the parties to indicate if
17 there were any that were omitted. The government in its
18 November 5th letter confirmed that that is the universe of
19 pending motions, some of which are fully submitted, some of
20 which are not yet fully submitted. But, Mr. Schulte, I wanted
21 to check with you, since I know you didn't have a chance to
22 submit a preconference letter, if there are other motions that
23 you believe are pending and I should be aware of.

24 MR. SCHULTE: I don't think that there are any
25 additional motions pending. There was a *Brady* violation letter

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1 that was filed, I believe September 14th, that I was waiting
2 for the Court to read and consider and order relief.

3 THE COURT: All right. Mr. Denton, do you know what
4 that refers to? I'm not sure I know what he's talking about.

5 MR. DENTON: Yes, your Honor. I think our
6 understanding is that that order -- that letter was addressed
7 by Judge Crotty's order denying the defendant's request for
8 production of additional server data from the CIA. Ultimately
9 that was what it pertained to. I'm not sure off the top of my
10 head whether that was one of the docket entries that was
11 specifically listed in Judge Crotty's order. But we can
12 double-check and confirm on that.

13 THE COURT: All right. Why don't you fill in by
14 letter next Monday. And obviously Mr. Schulte will get a copy
15 of that.

16 If, Mr. Schulte, you think there's anything that
17 remains open or any new issue that remains on that score, you
18 should let me know thereafter.

19 All right. Let's talk about the motions, then, that
20 are pending. There are three that are for the most part fully
21 submitted, aside from the Rule 29 motion, which I will bracket
22 for today's purposes. Let me talk about those three, beginning
23 first with the motion to suppress evidence seized from the MCC.
24 That is ECF no. 455. The government's opposition is at 499.
25 And the defendant's reply is at 521.

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1 First, let me say that, to the extent that Mr. Schulte
2 asks me to disregard the government's opposition, and he does
3 at page 2 of his reply, that request is denied. There's no
4 prejudice to him, since he was able to file a reply. And as
5 far as I can tell, it seems like both sides have taken some
6 liberties with respect to prior filings in this case, and I'll
7 have more to say on that in due course. But otherwise I will
8 consider the government's opposition and Mr. Schulte's reply.

9 I had a couple questions and then I may be able to
10 rule on the issue. Mr. Denton, let me pose a couple questions
11 to you in the first instance. First, I'm having a little
12 trouble understanding -- and, again, I want to emphasize that
13 we're in an unclassified setting -- precisely the relationship
14 between the so-called Schulte articles and email and what is or
15 was or wasn't classified. And I guess I have two questions.
16 First is, does that matter to the legal issues that I need to
17 decide in this motion? The subject defenses included not only
18 the disclosure of classified information but also violation of
19 the Court's protective order, possession of contraband in a
20 federal facility, and forth. So it's not clear to me whether
21 something that is or isn't classified, whether that matters.
22 And second, to the extent it does matter, can you just, again,
23 to the extent you can in an unclassified setting, set me
24 straight as to what you see the relationship between these two
25 things as being.

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1 MR. DENTON: So I think, fundamentally, your Honor, it
2 doesn't matter. I think a large part of the reason why it
3 mattered was that the defendant made much in his motion of a --
4 the purported fact that what he described as his tenth article
5 was something that had been provided to him in unclassified
6 discovery. There was a difference between what he was calling
7 his tenth article and item no. 10 on the list of articles
8 specified in the search warrant affidavit and warrant itself.
9 And so it was the article specified in the warrant affidavit
10 and the warrant appendix that did include classified
11 information that has only ever been produced in a classified
12 setting. So I think we're just correcting the record with
13 respect to that. But fundamentally, I don't think it matters,
14 your Honor.

15 THE COURT: All right. And number two, in your
16 opposition you relied on the fact of the indictment to support
17 probable cause. Can you elaborate on that. What's the
18 relationship between the indictment and the probable cause on
19 the day of the search to believe that there would be evidence
20 or fruits of the crime in Mr. Schulte's cell or in the MCC?

21 MR. DENTON: So, your Honor, I think, again, when
22 evaluating the search warrant affidavit under the totality of
23 the circumstances set forth therein, the indictment is one fact
24 that Judge Crotty was entitled to consider. Certainly standing
25 alone, it probably would not be sufficient. But when

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1 confronted with someone who has been indicted by a grand jury
2 for the transmission of unlawfully possessed classified
3 information, coupled with a variety of other facts set forth in
4 the affidavit, that indicate the defendant's intention to
5 continue surreptitiously transmitting information, the fact of
6 the indictment is something that bears on what Judge Crotty was
7 entitled to consider.

8 THE COURT: All right. But you were not suggesting
9 that that, standing alone, provided probable cause to justify a
10 search on October 3rd or 2nd of 2018.

11 MR. DENTON: No, your Honor.

12 THE COURT: And lastly, let me just clarify, I don't
13 know if there's a factual dispute or what, but I think
14 Mr. Schulte indicated that some materials were seized from his
15 cell on the 9th floor, that he has moved, I guess, from the 7th
16 to the 9th floor, and that some materials were seized from the
17 9th floor, and that the 9th-floor cell was not within the scope
18 of the warrant. I think you indicated in your submission that,
19 I think, that some materials were taken or recovered from the
20 MCC that had been moved from the cell on the 7th floor but not
21 that they were from the cell on the 9th floor. Is that --

22 MR. DENTON: That's correct, your Honor. There were a
23 set of materials that MCC officials had taken that were in an
24 office at the MCC that were provided directly from the office
25 to the FBI, not from the cell on the 9th floor.

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1 THE COURT: And what's your view -- to the extent that
2 there is a factual dispute on that issue, what's your view of
3 its materiality or relevance to me?

4 MR. DENTON: Your Honor, I don't think it's material
5 or relevant, particularly in light of the fact that there was a
6 second search warrant that was obtained for the materials that
7 were obtained from the office. Those are the notebooks and
8 other material that were described as privileged. So in this
9 instance, the material came from the cell, it was in the scope
10 of the warrant, was lawfully taken from the cell by the MCC
11 officials, not pursuant to a warrant but simply pursuant to
12 their administrative exercise of moving the defendant. They
13 then gave it to the FBI and got a second search warrant for
14 that set of materials after identifying that there was
15 potentially privileged information therein.

16 THE COURT: All right. Mr. Schulte, let me, I guess,
17 hear from you on a couple of those issues, first with respect
18 to the 9th floor cell issue versus the 7th floor. What's the
19 basis for your claim that these were recovered from the 9th
20 floor and why does that matter?

21 MR. SCHULTE: Yes, so for that argument it was
22 simply -- the government's saying that the search warrants
23 after the fact would have included that, but the search
24 warrants after the fact were based on the stuff that was
25 recovered. So essentially the search warrant only specified

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1 the second and seventh floor, so -- to search. And so all my
2 legal material was with me on the 9th floor. So the search
3 warrant does not -- it's outside the scope. I mean, if they
4 went to the third floor, to the fourth floor, the fifth floor,
5 that's outside the scope of the warrant. They can't do that.
6 So my legal materials were all with me on the 9th floor. Then
7 they came in and seized it while I was there. And then, from
8 that material, then they say, oh, well now we want additional
9 search warrants to see the stuff we already seized. It's just
10 crazy.

11 THE COURT: My question for you is, what's the basis
12 for you to say that they were with you on the 9th floor as
13 opposed to being in the MCC office, which is where Mr. Denton
14 suggests they were?

15 MR. SCHULTE: I mean, the only thing would be the
16 cameras there or the fact that I had a property receipt that
17 was given to me for my attorney-client notebooks and I attached
18 that has an exhibit. So whenever you receive property, they
19 took all my property except, I think it said, 11
20 attorney-client notebooks. There's a property receipt of the
21 officer giving that to me before the search. And so I have
22 that. And then that is conclusive evidence that that stuff was
23 clearly with me on the 9th floor and not where the government
24 claims it was.

25 THE COURT: Mr. Denton, is there something in the

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1 record that supports the proposition that these were recovered
2 from the office?

3 MR. DENTON: Your Honor, I think attached to the
4 defendant's prior motion to suppress on this were the
5 affidavits in support of both search warrants, and the second
6 search warrant describes the circumstances of their retrieval
7 from the MCC office.

8 THE COURT: Mr. Schulte, did you have something else
9 on that?

10 MR. SCHULTE: I guess on that, you know, I believe --
11 an evidentiary hearing about this specific issue.

12 THE COURT: Can you just point me to where in the
13 record you think there is evidence that these things were
14 recover from the 9th floor cell?

15 MR. SCHULTE: Yes. In my -- in the initial motion --
16 I don't have it in front of me -- there's an exhibit that -- I
17 think it's near the end. It's one of the last exhibits. And I
18 can go back and try and look for it. But it's a property
19 receipt that I received from the MCC that shows my
20 attorney-client notebooks as being given to me. It's just like
21 a one-page exhibit, but it's near the end. I think it's the
22 second-to-last one or the third-to-last exhibit, something like
23 that.

24 THE COURT: And when you say your prior motion,
25 meaning?

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1 MR. SCHULTE: The original -- the initial, or the
2 original motion.

3 THE COURT: Filed by counsel or the one that you --

4 MR. SCHULTE: No, no, by me.

5 They're saying at docket 455.

6 THE COURT: Yes. It's 455-17, Exhibit Q. But that
7 doesn't specify what the items were or necessarily show that
8 it's inconsistent with the October 3rd affidavit, does it?

9 MR. SCHULTE: I'm sorry? What was the --

10 THE COURT: It describes in generic terms ten books --

11 MR. SCHULTE: Right.

12 THE COURT: -- legal materials, 11 notebooks. But I'm
13 not sure if -- first of all, it says unit 7F. It doesn't say
14 anything about where it was taken from.

15 MR. SCHULTE: Yes. The property receipt is showing
16 where it's taken from and when it's given to me. Then that
17 means it's moved with me to the 9th floor. And you're right;
18 it doesn't say anything more specific except for the 11
19 notebooks, but those are the only notebooks that I have and
20 those are the only ones. There's no other -- there's no other
21 notebooks that I had except for those 11 notebooks, which
22 were --

23 THE COURT: What is the evidence in the record to
24 support the proposition that they were actually transferred to
25 you on the 9th floor?

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1 MR. SCHULTE: I guess it would be BOP procedure
2 describing what that document is, because what you're seeing --
3 you're right. You don't see that. But the way the BOP
4 procedure is, whenever you get a property receipt, that's when
5 you're going somewhere. So they give that property receipt to
6 me. And those are the documents that I took with me to the 9th
7 floor. All the remaining documents, they were seized and given
8 to the FBI.

9 THE COURT: All right. So let me give you my ruling
10 on this motion.

11 The motion is denied. First, I agree with the
12 government that at bottom the motion is an untimely and
13 impermissible motion for reconsideration. Mr. Schulte
14 previously filed a motion to suppress the fruits of the search
15 of the MCC, and Judge Crotty denied that motion on October 18,
16 2019, explicitly finding, contrary to one of Mr. Schulte's main
17 arguments here, that there was probable cause to support the
18 search. See ECF no. 159. There is no basis to seek
19 reconsideration of that ruling almost a year and a half after
20 the fact. The only thing that has changed as far as I can tell
21 is the fact that Mr. Schulte is now representing himself. But
22 that is obviously not a basis to seek, let alone grant,
23 reconsideration. To the contrary, Mr. Schulte was explicitly
24 warned by Judge Crotty that if he chose to represent himself he
25 would not be entitled to revisit rulings that the court had

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1 made, and he represented that he understood that.

2 That is enough to deny the motion. But separate and
3 apart from that, the variety of arguments Mr. Schulte makes are
4 without merit. First, there was plainly probable cause to
5 search the search, particularly given the deference owed to the
6 issuing judge's determination on that score. See *Illinois v.*
7 *Gates*, 462 U.S. 213, 236 (1983). The fact that some of the
8 items sought were not in and of themselves contraband, let
9 alone classified, does not undermine the validity of the
10 search. See, e.g., *In re Application of Madison*, 687 F. Supp.
11 2d 103 at 116 (E.D.N.Y. 2019). Indeed, separate and apart from
12 any issues relating to classification, there was plainly
13 probable cause to believe that Mr. Schulte was engaged in some
14 of the subject offenses, including but not limited to contempt
15 of Court, obstruction of justice, and smuggling contraband into
16 a federal facility. See paragraph 4 of the October 2nd, 2018
17 affidavit attached as Exhibit A to Mr. Schulte's motion.

18 The argument that the affidavits are false and
19 misleading is unsupported and largely for the same reasons
20 immaterial. That is, there is no basis for Mr. Schulte's
21 at-bottom ad hominem attacks on the affiant. But, again, even
22 without anything relating to the issue of classification, there
23 would have been probable cause. And in light of that,
24 Mr. Schulte satisfies neither prong of the *Franks* test.
25 There's no showing of deliberate falsehood or reckless

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1 disregard of the truth and no showing that any falsehoods or
2 omissions were necessary or material to the issuing judge's
3 determinations. See, e.g., *United States v. Canfield*, 212 F.3d
4 713, 717-18 (2d Cir. 2000).

5 Mr. Schulte's arguments about attorney-client
6 privilege were previously rejected by Judge Crotty, and I see
7 no basis or need to revisit those rulings. Moreover, the
8 government represents that it has no intention to offer
9 anything at a retrial beyond the exhibits previously admitted
10 which were found not to be privileged, and therefore that issue
11 is effectively moot.

12 I reject Mr. Schulte's remaining arguments about
13 overbreadth and the First Amendment substantially for the
14 reasons provided by the government at pages 15-18 of its
15 opposition. In addition and in any event, I agree with the
16 government that if there were any merit to defendant's
17 arguments, and there isn't, suppression would not be
18 appropriate in light of the good-faith exception. Pages 18-19
19 of the government's opposition.

20 With respect to the issue that we have just been
21 discussing, where the items were seized, Mr. Schulte has
22 provided no evidentiary basis to dispute the representation
23 made in the October 3rd affidavit that the relevant documents
24 were taken from the MCC's office. Accordingly, that motion is
25 denied.

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1 Moving to the second motion that is fully submitted,
2 namely, the motion to suppress evidence from the warrantless
3 seizure of Mr. Schulte's cellphone -- that is ECF no. 497; the
4 government's opposition is at ECF no. 525; and the reply is at
5 560. Once again, to the extent that Mr. Schulte asks me to
6 disregard the government's opposition -- that is also at page
7 26 his reply -- that request is denied for the same reasons --
8 which is not to say, by the way, that I'm thrilled with how
9 long it's taken the government to file its opposition on these
10 motions, and, again, going forward, I do not anticipate that
11 that will happen, let alone be tolerated.

12 On the substance, Mr. Denton, let me ask you a couple
13 questions. First, in Mr. Schulte's reply, he claims that the
14 government's opposition was the first time that one of the
15 search warrants, I guess the March 16th search warrant signed
16 by Judge Moses, the first time that he's seen it or it was
17 produced. Can you respond to that?

18 MR. DENTON: Your Honor, that's incorrect. All the
19 search warrant affidavits were previously produced.

20 Also, if I may, I think Mr. Lockard is going to be in
21 a better position to respond to the Court's questions on this
22 motion.

23 THE COURT: All right. Mr. Lockard.

24 MR. LOCKARD: Yes, your Honor.

25 THE COURT: So is that correct? Was that search

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1 warrant previously produced?

2 MR. LOCKARD: I don't know. I believe it was. Yes.

3 THE COURT: All right.

4 MR. LOCKARD: Yes.

5 THE COURT: As for the legal issues, let me ask you, I
6 guess, if I could ask you to focus on the delay between the
7 seizure and the ultimately successful search -- that is to say,
8 I think there's, for reasons that I'll articulate, there's very
9 little question in my mind that if the phone had been searched
10 on March 16th, pursuant to Magistrate Judge Moses's warrant,
11 that the government would have the better of it. My question
12 is what impact if any there is from the fact that the search
13 didn't actually take place on March 16th, that the government
14 wasn't able to get into the phone and then kept the phone for,
15 you know, something in the nature of two years? What relevance
16 if any does that have to the issue?

17 Let me put it more bluntly. There are certainly cases
18 that say unless there's independent evidentiary value to a
19 cellphone or a computer or the like, the government is obliged
20 to return it within a reasonable amount of time. Here, the
21 March 16th warrant authorized the government to conduct a
22 search through, I think it was March 30th, but having failed to
23 do that, was the government not obligated to return the
24 cellphone to Mr. Schulte, and was its failure to do that and
25 decision to keep it in the government's possession for close to

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1 two years, does that not give rise to a challenge to the
2 propriety of the later search?

3 MR. LOCKARD: Yes, your Honor. It doesn't here,
4 because the failure to execute the search wasn't for lack of an
5 attempt.

6 THE COURT: Could you pull the microphone a little
7 closer to you.

8 MR. LOCKARD: Yes, your Honor. The failure to execute
9 the search promptly after the initial search warrant wasn't for
10 lack of an attempt to execute the search. The execution was
11 unsuccessful because of password protection and encryption of
12 the data. It doesn't mean that the data doesn't have an
13 evidentiary value. It means that the FBI was unable to access
14 it. I think they were certainly entitled to continue to
15 attempt to overcome that encryption and password protection,
16 and at such time that they actually were able to, a new warrant
17 was applied for and a new warrant was issued with a full
18 description of the preceding history.

19 THE COURT: And you have authority for the proposition
20 that the government can just hang onto it if it tries and fails
21 to gain access?

22 MR. LOCKARD: I don't have a cite handy for the Court.

23 THE COURT: All right. Mr. Schulte, do you care to
24 respond to either of the issues that I've raised?

25 MR. SCHULTE: Yes. The first issue, I just want to

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1 say that the search warrant was definitely never presented. I
2 think the government should provide a discovery production
3 number if they're trying to argue that it was produced. But
4 this is the first time I've ever seen the search warrant. My
5 attorneys have never seen it. They've never been -- it's never
6 been produced.

7 The next issue about keeping the cellphone, yeah, you
8 know, if they -- well, the first issue, I think, is the fact
9 that the initial seizure of the cellphone was due to the fact
10 of the subpoena. And so that -- any subsequent search warrant
11 is fruit of the poisonous tree because you can't just use a
12 subpoena to seize a search warrant -- I mean, you can't just
13 use subpoena as a search warrant to seize a device. So that
14 March 16th search warrant is already invalid because they
15 already executed the seizure and they executed the search or
16 they attempted to execute the search of the cellphone just by
17 virtue of using the subpoena.

18 And then I also agree that keeping the cellphone,
19 which they just kept for two years, due to that seizure,
20 there's no basis at all for such a long-term seizure like that.

21 THE COURT: All right. So, first of all, Mr. Denton,
22 Mr. Lockard, let me be clear. Even if the search warrant
23 hadn't been produced previously, it wouldn't give grounds to
24 the grant the motion, because obviously it has now been
25 produced and Mr. Schulte has had an opportunity to respond to

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1 it.

2 That being said, I do want to ensure that everything
3 that should have been produced was produced and that there's a
4 clear record. So to that end I'll add to your Monday homework:
5 If you can identify when that was produced and point
6 Mr. Schulte to it in the prior productions and let me know that
7 you've confirmed that, I would be grateful.

8 With respect to the merits, I am actually going to ask
9 the government to brief the issue that I raised, and I'll get
10 to more of that in a moment. But with respect to the argument
11 Mr. Schulte makes, because I'm not sure that that is really the
12 argument he's making here, I find that those arguments are
13 without merit. The search itself -- excuse me. The argument
14 that he is making is that the cellphone was unlawfully seized
15 in the first instance pursuant to the forthwith subpoena and
16 that the search must be suppressed as a fruit of that unlawful
17 procedure. But the Supreme Court and the Second Circuit have
18 held that "where law enforcement authorities have probable
19 cause to believe that a container holds contraband or evidence
20 of a crime but have not secured a warrant," the Fourth
21 Amendment allows them to seize the property "pending issuance
22 of a warrant to examine its contents if the exigencies of the
23 circumstances demand it." That is *United States v. Place*, 462
24 U.S. 696 at 601 (1983). See also *United States v. Martin*, 157
25 F.3d 46, 53 (2d Cir. 1998). That doctrine squarely applies

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1 here, at least would if the cellphone had been successfully
2 searched on March 16. On March 15, 2017 law enforcement knew
3 among other things that Mr. Schulte had international travel
4 plans the next day and that he had previously conducted
5 multiple Google searches relating to the deletion of data. See
6 ECF no. 527-7 at paragraphs 28 and 30 and ECF no. 525-1 at
7 paragraph 21.

8 Additionally, law enforcement had probable cause to
9 believe that the cellphone contained evidence of criminal
10 activity under investigation, as evidenced by the fact that
11 Magistrate Judge Moses issued the warrant later that very
12 night. See ECF no. 525-6, paragraphs 23 and 24.

13 And finally, upon being confronted by law enforcement,
14 Mr. Schulte knew that he was a suspect in the investigation and
15 that the FBI was searching his apartment and other electronic
16 devices, which was relevant to the probable-cause determination
17 and the existence of exigencies justifying the seizure. See,
18 *e.g., United States v. Babcock*, 924 F.3d 1180, 1195-96 (11th
19 Cir. 2019), finding exigent circumstances because the defendant
20 had "the ability and incentive to, after learning of the
21 investigation" from law enforcement, "destroy damning
22 information contained on his phone." And *United States v.*
23 *Bradley*, 488 F. App'x 99, 103-104 (6th Cir. 2012), relying in
24 part on the defendant's knowledge that he was under
25 investigation and that law enforcement would likely get a

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1 warrant to search his computer to find that exigent
2 circumstances justified the initial seizure of the computer.

3 Contrary to Mr. Schulte's contentions, it doesn't
4 matter whether the agents who seized his cellphone did so on
5 the ground that there were exigent circumstances or if they
6 relied, rightly or wrongly, on the use of a forthwith subpoena.
7 After all, the Supreme Court has "repeatedly rejected a
8 subjective approach" to the Fourth Amendment. That's *Fernandez*
9 *v. California*, 571 U.S. 292, 302 (2014). See also *US v.*
10 *Schmidt*, 700 F.3d 934 (7th Cir. 2012) -- "We do not look at the
11 subjective motivations of an officer when examining the
12 objective basis for a finding of exigent circumstances" -- and
13 *United States v. Moreno*, 701 F.3d 64 (2d Cir. 2012), holding
14 the same.

15 Thus, the agents' initial seizure was justified by
16 exigent circumstances, and within hours the agents obtained a
17 warrant from Magistrate Judge Moses both ratifying the seizure
18 and authorizing the search. In light of that, there would be
19 no basis if the search actually then occurred to invalidate the
20 result of the search as Mr. Schulte argues. See, e.g.,
21 *Babcock*, 924 F.3d at 1192-95, approving the search of a
22 cellphone pursuant to a warrant obtained two days after the
23 initial warrantless seizure. *Bradley*, 488 F. App'x at 106,
24 approving the search of a computer pursuant to a warrant
25 obtained approximately 26 hours after the initial seizure of

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1 the defendant's computer, and citing cases upholding delays
2 between seizure and search of 29 hours, 48 hours, and 11 days.
3 See also *United States v. Smith*, 967 F.3d 198, 2006 (2d Cir.
4 2020), discussing the factors to be considered in evaluating
5 whether law enforcement has waited an unreasonable amount of
6 time between a warrantless seizure and seeking a search
7 warrant.

8 In short, again, assuming that the search had actually
9 occurred in the wake of Magistrate Judge Moses's warrant, the
10 seizure of the cellphone "pending issuance of a warrant to
11 examine its contents does not require suppression of the
12 evidence derived from its eventual search." *Martin*, 157 F.3d
13 at 53.

14 For those reasons, the motion as framed is denied.

15 Having said that, I think there is a potential issue
16 here with respect to the delay that followed the Magistrate
17 Judge Moses warrant, namely, the fact that the government held
18 the phone in its possession for close to two years before it
19 ultimately conducted the search. And on that score I'm going
20 to order the government to show cause why it shouldn't be
21 suppressed on that basis due to that delay, which is a slightly
22 different argument than the one that Mr. Schulte made. I would
23 direct your attention to the *Smith* case that I cited, again 967
24 F.3d 198, which I think speaks to some of the relevant issues
25 here, namely, the fact that the government does have an

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1 obligation to return a phone or computer unless the phone or
2 computer has independent evidentiary value in connection with a
3 case.

4 So we'll talk about a briefing schedule on that. I'll
5 give Mr. Schulte an opportunity to reply to whatever the
6 submission the government makes. But let's table that until we
7 talk about the other motions that are not yet fully submitted.

8 The final motion that is ripe for consideration is the
9 motion for bail, which I think is still perhaps -- no, I think
10 the classification review has been completed but I'm not sure
11 it's been docketed. But, Mr. Hartenstine, do you know the
12 answer to that.

13 MR. HARTENSTINE: Sorry, your Honor. Yes, it has been
14 docketed, I believe.

15 THE COURT: All right. On October 21st, the
16 government filed its opposition to that motion. That is ECF
17 no. 562. And I indicated in my October 28th order, which
18 standby counsel had read to Mr. Schulte, that I would give him
19 an opportunity to respond orally to the government's
20 submission.

21 So, Mr. Schulte, do you wish to be heard in response
22 to the government's opposition?

23 MR. SCHULTE: Well, I had a couple -- a couple things
24 I wanted to discuss with the Court about this. So prior to
25 your order on 10/28, I mailed to the Court a letter that

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1 perhaps you'll receive sometime, requesting both the extension
2 to file the reply, and I had already drafted the reply, and it
3 would have been filed if I had been able to -- it would have
4 been filed before, I think, your 10/28 letter if I had been --
5 if I had access to -- if I hadn't been moved, if I had access
6 to my --

7 THE COURT: Mr. Schulte, I understand that. I'm
8 giving you an opportunity to respond orally. So anything you
9 wish to say in response to the government's opposition, this is
10 your opportunity.

11 MR. SCHULTE: I just haven't had the time to review it
12 since I haven't had my -- the discovery and I haven't had
13 access to the motion, I haven't had access to many of the terms
14 over the last three weeks. So I was hoping to adjourn that so
15 that I can have an opportunity to, for example, the reply that
16 I wrote, to at least print it so I have this material and I can
17 bring it up orally with you if that's what you wish.

18 THE COURT: I'm sorry. I didn't understand that last
19 bit. Can you say it again?

20 MR. SCHULTE: Yes. So if the Court doesn't permit me
21 to file the reply brief, then I at least -- that I have an
22 opportunity to print it and have all the material in front of
23 me so I can brief it to you orally and some of the other issues
24 that the government raises that I simply, in the last three
25 weeks, I haven't had access to, so that I can make a compelling

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1 argument. And I was going to ask the Court for an adjournment
2 on that, and until the discovery issues with the law library
3 and --

4 THE COURT: I'm a little confused, Mr. Schulte. You
5 told me that you already drafted a reply and it just hasn't
6 been docketed. Does that necessitate any additional time in
7 the law library?

8 MR. SCHULTE: No. Because I don't have it -- I can't
9 get a copy of that here. I, I -- there's no way -- it's
10 basically, it's on one -- it's on one of the hard drives that
11 has to be powered in. And I haven't had access to that. So I
12 don't have, I don't have it with me. I don't have it at --
13 until I have access to the law library so I can get the hard
14 drive connected by power, and then I have access to this -- to
15 my reply motion and all the arguments that I made.

16 THE COURT: All right. Fine. So I will defer ruling
17 on that to give you an opportunity to be heard. Whether that
18 is in writing or orally remains to be seen, I suppose. But why
19 don't we set a deadline for you to actually file your reply,
20 and then I'll take it under advisement.

21 So, in light of that, let's talk about the remaining
22 deadlines. Why don't we start with that last issue that I just
23 discussed. Mr. Lockard or Denton, how much time would you like
24 to file a brief in response to the question that I posed?

25 MR. DENTON: Your Honor, could we have two weeks,

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1 until November 22nd?

2 THE COURT: All right. That's fine. Why don't you go
3 through the other issues that remain open, and then let's talk
4 about how much time Mr. Schulte needs.

5 First there's a motion for internet access. That's
6 ECF no. 557. Per my order, the government is to file any
7 opposition, not to exceed 25 pages, by November 12. I assume
8 that opposition is forthcoming; is that correct?

9 MR. DENTON: Yes, your Honor.

10 THE COURT: All right. So that's one item that
11 Mr. Schulte needs to respond to. I guess let's call that 2.
12 And the first is the response to the government's response to
13 my order to show cause. And lest it be left unclear, let's say
14 that that is a maximum of 25 pages as well.

15 Next is the motion regarding classification. The
16 classification process, that was ECF no. 559, per Judge
17 Crotty's order of October 18th, which was ECF no. 561, the
18 government submitted its proposed procedures for future
19 classification review on November 2nd. That's ECF no. 573. At
20 the moment, Mr. Schulte is required to reply to that by
21 November 17th.

22 Mr. Schulte, let me confirm that you've gotten a copy
23 of the government's November 2nd submission?

24 MR. SCHULTE: Yes. I received that today.

25 THE COURT: All right. Very good.

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1 And the fourth item is the motion to dismiss Counts
2 Three and four, which I think is also undergoing classification
3 review. I don't know if that's been docketed. I don't think
4 so, Mr. Hartenstine. Is that correct? Motion to dismiss
5 Counts Three and four, that's still undergoing review?

6 MR. HARTENSTINE: Your Honor, now that you ask that
7 about document issues with regard to the redacted versions, I
8 provided those to defense -- or standby counsel for docketing.
9 I don't believe I've had an opportunity to verify that they
10 were indeed docketed, but I will do so today, and get back to
11 the Court.

12 THE COURT: All right. Thank you.

13 The government is due to respond to that in a brief,
14 not to exceed 25 pages, also by November 12th. Mr. Denton, are
15 you on track to do that?

16 MR. DENTON: Yes, your Honor.

17 THE COURT: All right. And currently the defendant,
18 Mr. Schulte, is entitled to file a reply, not to exceed ten
19 pages, by November 24th, but we'll discuss that in short order.

20 And finally, there's the CIPA Section 5 notice, also
21 undergoing classification review. On October 26, the
22 government filed a letter opposing that notice and seeking to
23 form some additional relief, one of which I think I've already
24 addressed. That's ECF no. 567. And Mr. Schulte currently has
25 until November 10th technically to file a reply not to exceed

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1 ten pages.

2 In light of the issues that we discussed earlier,
3 Mr. Schulte, I'm obviously prepared to give you additional time
4 to make all of those submissions. It's not an insubstantial
5 amount of work under the best of circumstances. Obviously it
6 hasn't been the best of circumstances. So I guess the question
7 I have for you is what your thoughts are with respect to those
8 deadlines, if giving you an additional two weeks for each of
9 them would suffice, if you want to propose something, either
10 now or in writing, but I certainly think some clarity on when
11 those filings will be coming is in order.

12 MR. SCHULTE: For the CIPA file, the fifth one that
13 you mentioned, I already -- I wrote, it's a handwritten
14 response that was mailed a couple weeks ago. So I guess we'll
15 wait and see if the Court receives that or not.

16 For the remaining ones, I think, yes, I think just a
17 two-week extension and a pending -- hopefully I'm able to
18 review, go to the law library and go to the SCIF. And that
19 should be all I require. But if those issues continue, then
20 I'll raise it to the Court's attention.

21 THE COURT: All right. So that's fine with me. Let's
22 say unless and until I say otherwise, the deadlines will be as
23 follows: The government is to file its response to, for lack
24 of a better way of describing it, my order to show cause on the
25 delay of that cellphone search by November 22nd, not to exceed

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1 25 pages. The defendant is to respond, I'll give you three
2 weeks for the response, just given the intervening holiday
3 there, and your reply cannot exceed ten pages.

4 Then I'll grant the two-week extension on each of the
5 other submissions that we discussed. So reply on the internet
6 access, motion not to exceed ten pages, is due on December 8th.
7 The response on the classification process, the response to the
8 government's submission of November 2nd is due by December 1st.
9 The reply on the motion to dismiss Counts Three and Four, not
10 to exceed ten pages, is also due on December 8th. And the CIPA
11 5 notice, it sounds like you already submitted your reply, so I
12 assume that that is moot and we don't need to address it
13 further.

14 Now, if those deadlines prove to be impractical for
15 some reason, I trust that you or standby counsel will let me
16 know and we'll adjust as needed. But I certainly want to make
17 sure that we keep this thing moving on a forward trajectory.

18 With respect to future motions, let me say first and
19 foremost that, as stated in my October 28th order, that unless
20 and until I say otherwise, the following rules and procedures
21 that I set forth in that order will apply to any future
22 motions, whether filed by the government or by Mr. Schulte.
23 That is, absent prior leave by me, any memorandum of law
24 submitted in support of a motion or in opposition to a motion
25 shall not exceed 25 pages, double-spaced with at least a

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1 12-point font, to avoid any confusion on that. And any reply
2 is not to exceed ten pages. And any opposition, unless and
3 until I say otherwise, is to be filed within three weeks of the
4 motion being filed. And any reply must be filed within two
5 weeks of the opposition.

6 I will obviously allow some -- you know, with respect
7 to the mailing-type issues and those sorts of practical
8 problems, you know, I will be accommodating within reason. But
9 the bottom line is that both sides need to comply with the
10 deadlines and page limits going forward, and I'm not going to
11 tolerate it from either side if you do otherwise.

12 I will make one, just, request to standby counsel. I
13 think you're the ones who file things on ECF on Mr. Schulte's
14 behalf. When filing a motion on his behalf, if you can make
15 sure that you enter into the docket text the substance of the
16 motion so it doesn't simply say "letter motion" or "motion" but
17 actually specifies what the relief you're seeking is, I think
18 that that would help ensure that the docket is more
19 intelligible and we can keep track of things.

20 My October 20th order raised the question about future
21 motion practice. I certainly have seen Mr. Schulte's
22 representation, or claim, or whatever one might describe it as,
23 that he intends to file a slew of other motions. The question
24 I have is what the basis for that would be. As my ruling with
25 respect to the MCC-search motion made clear, the fact that he's

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1 now pro se does not in my view give him the right or
2 entitlement to file motions that he previously had an
3 opportunity to file, and in that regard I think he would have
4 to demonstrate good cause before filing any motion that doesn't
5 pertain to something new, which would obviously constitute good
6 cause.

7 So I'm open to suggestions from both sides on this
8 front, but I think the bottom line is that, you know, I would
9 have to be persuaded that further motion practice is
10 appropriate.

11 Mr. Denton, do you have any views on this?

12 MR. DENTON: Your Honor, I think the Court is accurate
13 as a matter of law that we're now in a place where the
14 defendant would need to demonstrate good cause for continued
15 motions. I think from a practical perspective, as far as
16 submission and responses to motions, as a general matter, as
17 part of our explanation for why the defendant would not be
18 prejudiced by denial of the filing of an untimely motion, the
19 government is always going to respond on the merits, and so
20 address the defendant's motions.

21 I think what that means in terms of timing is that it
22 would probably be to the benefit of both sides if, once the
23 Court settles on a trial date on this matter, we set a motions
24 date and a response date, and the defendant is free to file
25 things whenever he wishes, but there will be sort of one

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1 schedule and the government will respond in toto on a date
2 certain.

3 THE COURT: All right. Mr. Schulte, do you wish to be
4 heard on that?

5 MR. SCHULTE: Yeah. As far as the motions go, as I
6 began -- I think Judge Crotty's order granting my pro se status
7 was end of July or something like that, so I've only had a few
8 months so far. And the whole reason I decided to represent
9 myself was so that I could file motions that my counsel wasn't
10 filing or so -- or due to what I perceived to be
11 ineffectiveness on their part on the other motions that they
12 had filed.

13 So, yeah. So going forward, you know, I still, like I
14 said, there's still a bunch of discovery that I haven't been
15 able to review yet. And then also, due to the SCIF limitations
16 and stuff like this, discovery -- I mean, law library review,
17 I've been hampered in going through all the different motions
18 and stuff that I wished to file.

19 THE COURT: All right. Well, I think what I will do
20 is, after we discuss and set a trial date, I think I will do
21 what Mr. Denton proposed, which is set a firm deadline for any
22 future motions to be filed, and recognizing that Mr. Schulte's
23 initial burden is to persuade me that he should be heard on a
24 new motion if it is something that he could have previously
25 made in the case. But I think that makes the most sense to

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1 sort of bring some order to this.

2 Let me just underscore something that I did put in the
3 October 28th order but just underscore orally, which is that
4 both sides are reminded that classified information, or
5 information that a party reasonably should know is classified,
6 cannot be publicly filed outside the procedures and without the
7 authorization set forth in CIPA, the Classified Information
8 Procedures Act, and the protective order entered by Judge
9 Crotty at ECF no. 61. That includes information that is
10 classified even if it pertain -- if it appears in the public
11 domain. That is to say, appearance in the public domain does
12 not automatically declassify information. So I want to make
13 sure that everybody is aware of that and everybody heeds those
14 limitations. And I don't want to have any problems on that
15 score going forward. If there are, particularly with respect
16 to Mr. Schulte's filings, obviously that could give rise to
17 penalties, including but not limited to forfeiting the right to
18 represent himself. So I trust that there won't be any issues
19 of that sort.

20 Let's talk about trial dates. Mr. Denton, the
21 government indicated in its preconference letter, I think, that
22 you anticipate the trial would take about three weeks. Is that
23 the government's case in chief, or a whole trial? What's your
24 thought on that?

25 MR. DENTON: Your Honor, that's a ballpark for the

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1 whole trial. I think the government's case in chief would take
2 ten to 15 trial days. So assuming the Court is going to sit
3 five days a week, I think, assuming a couple of days for the
4 defense case, we think three weeks. That's obviously an
5 estimate, your Honor.

6 THE COURT: All right. And can you just educate me
7 what your best guess or expectation would be with respect to
8 the need and extent of pretrial litigation, CIPA litigation --
9 that is to say, how long before trial that litigation would
10 occur, how many hearing days I would reasonably need to
11 anticipate, and so forth, since that has some bearing on
12 scheduling trial.

13 MR. DENTON: Your Honor, I expect that it would be
14 comparatively few. There was extensive Section 6 litigation
15 already in this case, and a wide variety of rulings on
16 essentially all of the evidence that either party wanted to
17 introduce at trial. So I think, you know, it probably would be
18 safe to estimate a day for a hearing. I would hope we were not
19 in the realm that we were before with five and six days. Think
20 that is something that would make sense to plan to conduct at
21 least 30 days before trial, just to allow time for the
22 implementation of the Court's rulings, as we indicated, either
23 through declassification or, as there was last time, in a very
24 limited context, litigation over the interplay between the
25 *Waller* factors and Section 8 of CIPA.

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1 THE COURT: All right. Last question for you and then
2 I'll turn to Mr. Schulte. Can you advise what the status of
3 the severed charges is and tell me, is there any reason that
4 those should not be brought to trial in the first instance on
5 the theory that they may raise fewer classification issues? Am
6 I missing something?

7 MR. DENTON: So, your Honor. Those charges obviously
8 do remain pending. It had always been, at least I understand,
9 defense's preference to proceed first with the espionage
10 charges. I think it is, given that that is what everyone has
11 been focused on preparing for, I think it's unlikely that we
12 could do a trial on the other charges much faster than the
13 current one. It just simply hasn't been, I think, the focus
14 for either side. But it is undoubtedly correct that it
15 presents dramatically fewer issues related to classified
16 information.

17 THE COURT: All right. Mr. Schulte, focusing then on
18 the espionage-related charges, do you wish to say anything with
19 respect to either the length of the trial or when you would
20 want to have trial scheduled for?

21 MR. SCHULTE: Yeah. So it would be -- setting the
22 trial date, it's difficult to come up with a date at this time,
23 especially because there are some additional unresolved issues
24 regarding how I'm able to conduct investigations and find and
25 hire experts, due to my limited capacity. This was brought up

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1 a little bit with Judge Crotty but hasn't really been fully
2 addressed.

3 And then there was another issue I wanted to discuss
4 on this same topic, and that's the interlocutory appeals and
5 mandamus petitions that are currently outstanding, as I would
6 want to wait until these are resolved. And one of my -- one of
7 my letters to the Court was simply to ask that the Court look
8 at some of these -- some of these decisions that were issued by
9 Crotty and -- mandamus petition and interlocutory appeal. For
10 example, that habeas corpus petition, I filed a habeas corpus
11 petition in November 2020 in a separate civil case. Judge
12 Oetken was assigned it, and he dismissed the petition, arguing
13 *Younger v. Harris*; he can't interfere in a criminal case and I
14 had to file it in a criminal case. So when I filed it before
15 Judge Crotty, Judge Crotty also dismissed it and said, well,
16 you can't file this in a criminal case, you have to file it in
17 a civil case. So I have no options available except mandamus
18 at that point. And I don't think that the Court of Appeals --
19 I mean, is clearly not going to agree that I don't have any
20 right to a habeas petition.

21 And so these issues like this, I think, you know, it's
22 up to the Court obviously, but I just wanted to raise some of
23 these issues that are, at least in my mind, pretty clear, and I
24 think if this Court reviews some of these issues, that it would
25 issue different opinions.

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1 And I'm not -- I wasn't asking for additional motions,
2 arguments, or anything like that, but just simply, if the Court
3 would look at the filed mandamus petitions or the motions
4 already filed by both parties, if the order seems legitimate,
5 then not to do anything but, if, in this case, for example,
6 this habeas petition, I think, is a pretty clear example, as
7 well as the CIPA 4 discovery motion. You know, the government
8 is claiming I hacked three servers and stole national defense
9 information from the servers. But they're refusing to turn
10 those over, claiming state secrets privilege, even though the
11 law clearly states that, you know, if you're giving this to
12 your experts and you're relying on this in your case in chief
13 in trial, then my experts have to have an opportunity to rebut
14 this. And at the first trial, the biggest issue was, my expert
15 could not testify because he did not have the same evidence and
16 so he couldn't -- he couldn't rebut the government's argument
17 or say anything. So --

18 THE COURT: All right. Mr. Schulte, let me stop you
19 and say a few things. One is, I am generally not going to go
20 backwards and start reconsidering rulings that Judge Crotty
21 made in this case. My plan is to plow ahead and try to bring
22 this thing as speedily as possible to trial. And part of that
23 entails not revisiting things just because a new judge has been
24 assigned to it. And there's plenty of case law and doctrine to
25 support that approach.

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1 Number two, to the extent that you have filed appeals
2 or mandamus petitions, there is a general proposition, which is
3 that I lack jurisdiction to address whatever issues you've
4 raised on appeal. So if you want to withdraw your appeal and
5 raise something with me, you're certainly welcome to do it.
6 But if it's pending before the Second Circuit, I don't think I
7 have any authority to do anything about it.

8 Number three, separate and part from all that, my plan
9 is to set a trial date. I think that is necessary. I think
10 it's important. I think it's important to get this case, you
11 know, moving and ensure that it proceeds at a deliberate pace,
12 to ensure that the MDC gets you what you need to ensure that
13 you can prepare for trial, that the marshals get you here and
14 give you SCIF time. I think it's important for you. I think
15 it's important for the public. I think it's important for the
16 government. And I intend to set a trial date and do everything
17 in my power to ensure that we keep that date. So the issues
18 that you've raised don't strike me as inconsistent with my
19 doing that.

20 So the bottom line is, I hear you, but we're plowing
21 ahead, moving forward. And an important part of that is that
22 I'm setting a trial date.

23 So, having said that, do you wish to be heard with
24 respect to when this case is set down for trial? I would be
25 inclined to do it next May. I think that would give you plenty

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1 of time to sort through the things you need to sort through,
2 file whatever motions you think you should file, and for us to
3 deal with the sorts of things we've been discussing, but do you
4 wish to be heard on that?

5 Yes, Mr. Schulte.

6 MR. SCHULTE: So, I mean, I agree with everything that
7 you're saying. Obviously I have an interest in moving this
8 along as well. And the May date does sound like that will
9 probably be a good date. But just talking with standby
10 counsel, they inform me that I need to check with the expert.
11 And they said that you're a stickler on the date. And so, you
12 know, instead of having to -- instead of requesting a delay or
13 a change of the date, they're saying essentially a self-commit
14 and -- to a May trial date and then deferring discussing our
15 expert to make sure that he can make that date and stuff like
16 this.

17 THE COURT: And how long would it take for you to
18 check with and confirm with your expert?

19 MR. SCHULTE: Ten days.

20 THE COURT: All right. I'm going to put it down to
21 begin on May 23rd. I'll give you two weeks, Mr. Schulte, to
22 advise me if there is an irreconcilable conflict with that date
23 for your expert. But it better be a truly irreconcilable
24 conflict for it to rise to the level that I would move it on
25 that basis. And two weeks means two weeks. So if I don't hear

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1 from you in that time, then I assume that that issue is moot
2 and not a concern.

3 I will give you a heads up that we probably won't sit
4 on Monday, June 6th and June 7th, but other than that, we'll be
5 on trial until it concludes. That is a firm date as far as I
6 am concerned. I do not know right now whether we will still be
7 operating under COVID protocols for the second quarter of 2022.
8 If we are, then it's obviously subject to that date being
9 assigned to me in the centralized trial scheduling process that
10 we are currently living with, and in that one respect would be
11 contingent, but separate and apart from that and subject to
12 Mr. Schulte advising me if there is an irreconcilable conflict,
13 everybody should understand that that is a firm date and I will
14 do everything in my power to ensure that we stick with it.

15 What that means is, if there is anything that could
16 affect our ability to start trial on that date, whether it is
17 an issue pertaining to classified information, an issue with
18 standby counsel, an issue with discovery, anything, you better
19 raise it with me sooner rather than later. The longer you
20 wait, the more likely it is that I would deny any request for
21 relief that would affect our ability to start trial on that May
22 23rd date.

23 Mr. Denton, do you understand that?

24 MR. DENTON: Yes, your Honor. If I may, just one
25 point with respect to that. Obviously this does depend a

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1 little bit on whether the sort of COVID protocols and trials in
2 particular courtrooms are still in effect. For the last trial
3 in this matter, there were a whole variety of security
4 procedures that Judge Crotty approved, which were designed
5 around his courtroom and the fairly standard layout in the 500
6 Pearl Street courthouse. Depending on when the trial is
7 assigned to a particular courtroom, we'll obviously be prepared
8 to do the same work. To make sure those arrangements take
9 place, we just may have to start over, depending on where the
10 trial is going to be.

11 THE COURT: Understood. I will obviously stay in
12 touch with Mr. Hartenstine and his colleagues and make sure
13 that I do whatever we need to do. But you should also make
14 sure that you educate me to the extent that there are any needs
15 or issues that I need to attend to and that you do that in a
16 timely fashion so that we can take care of whatever we need to
17 take care of whenever we need to take care of it. All right?

18 MR. DENTON: Yes, your Honor.

19 THE COURT: All right.

20 Mr. Schulte, do you understand what I was saying about
21 that being a firm date?

22 MR. SCHULTE: Yes, I do.

23 THE COURT: All right. And, Ms. Shroff, I assume you
24 understand as well?

25 MS. SHROFF: I do, your Honor.

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1 THE COURT: All right. Very good.

2 What I will ask is for the parties to confer. In an
3 ideal world hopefully you can reach agreement. But I'd like
4 you to submit a proposed pretrial schedule that works backwards
5 from that May 23rd date and includes, number one, a deadline
6 for the filing of any pretrial motions, again subject to the
7 proviso that if it's an issue that Mr. Schulte could have
8 raised earlier, he is going to have to first demonstrate why I
9 should even entertain the motion. But I think a deadline for
10 any new motion is in order, in addition to deadlines for any
11 CIPA filings and the like, working backwards from the trial
12 date, to ensure that there's an adequate amount of time between
13 whatever hearings are required on that score and trial.

14 So why don't you confer with one another. And,
15 Mr. Denton, I'll put the onus on you to submit a proposed
16 schedule. If Mr. Schulte disagrees, you can either include his
17 position on it or I'll give him an opportunity to be heard.
18 But would a month from now be realistic to submit a proposed
19 schedule?

20 MR. DENTON: Definitely, your Honor.

21 Just to give us something to anchor to, for filings
22 closer to trial like motions in limine, requests to charge and
23 so on, how far in advance of the actual trial date would your
24 Honor like those to be fully submitted?

25 THE COURT: So I'm going to leave it to you to propose

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1 something that you think makes sense, mindful that I need an
2 adequate amount of time to consider any of those submissions.
3 You know better than I what they're likely to look like, that
4 is, how substantial they're likely to be. In the normal case,
5 I only, you know, I would usually set the deadline a few weeks
6 before trial because it doesn't take very long to go through
7 them. But this is not a normal trial, and I anticipate that
8 between the number of issues that both sides may wish to brief
9 and my need to decide them, not to mention the classification
10 issues, that it would pay to pad it and provide for a lot more
11 time than a normal case.

12 So why don't you make a proposal. If I think it's
13 reasonable, I will adopt it. If not, I will adjust it as I see
14 fit. Does that make sense?

15 MR. DENTON: Understood, your Honor.

16 THE COURT: All right. And, Mr. Schulte, why don't
17 you consult with the prosecutors, and hopefully everybody can
18 reach agreement on a schedule that makes sense and is
19 reasonable for everyone, including me. If there's any
20 disagreement, you can, again, either convey it to the
21 government to include in that letter, do it within a month, or,
22 if you wish to file your own response, you can file something,
23 let's say, one week after the government's letter would be due.

24 In connection with that, Judge Crotty had previously
25 ordered that the parties confer after a trial date was set with

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1 respect to an increase in SCIF time and those sorts of
2 arrangements, and I would ask that you do that as well. And,
3 Mr. Denton, why don't you speak with the marshals and the MDC
4 if needed, just to figure out what the issues are there, and
5 hopefully everybody can come up with a proposal that makes
6 sense, but certainly again I'll make sure that the defendant
7 has an adequate amount of time to prepare as trial approaches.

8 The third thing to include in there, as the government
9 proposed in its letter in ECF no. 567, is that essentially a
10 deadline be set for all CIPA Section 5 notices, or at least
11 that the single omnibus response to those notices be allowed.
12 I think that makes sense. Indeed, I think it makes sense to
13 set a firm deadline for any Section 5 notices. So I would ask
14 that you discuss that with one another and include that in your
15 proposed pretrial schedule.

16 Any questions, concerns, or the like? Mr. Denton.

17 MR. DENTON: Your Honor, just with respect to the SCIF
18 access, I think we certainly will confer, and I think we may
19 even be able to reach an agreement in principle. I think one
20 of the issues that we had during the more recent difficulties
21 was pertaining to the Court's usage of the 9th floor for
22 various court purposes that may not be known to us so far in
23 advance. I think we're certainly happy to, like I said, reach
24 an agreement in principle on what the parties are able to
25 accomplish and let your Honor know. And hopefully we'll be

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1 able to actually implement it.

2 THE COURT: All right. Understood. Talk to the
3 marshals as well. I understand that's an issue on their front.
4 That's one of the reasons I called the marshals, to discuss
5 those parameters with him. I think for the next month he
6 sorted it out in a way that didn't require sort of creative
7 thinking about how to overcome that particular problem. But
8 the bottom line is, I'll try to make sure that he gets access
9 to the SCIF even if there are things going on in that
10 courtroom. And if we need to think creatively and do things
11 differently, that then I'm prepared to do that. So hopefully
12 you all can sort it out, though. Understood?

13 MR. DENTON: Yes, your Honor.

14 THE COURT: Mr. Schulte, any questions, problems about
15 any of that?

16 MS. SHROFF: Your Honor, could we just have a minute?

17 THE COURT: Sure.

18 And then I do need to wrap things up.

19 MR. SCHULTE: No, nothing, more.

20 THE COURT: All right. The last two items are the
21 next status conference and speedy trial. I would be inclined
22 to set another status conference just to make sure that things
23 are on track and try and nip things in the bud, particularly
24 given some of the communications and delay issues that
25 Mr. Schulte has had. I just want to make sure that he has the

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1 ability to be heard and we address things in a timely fashion.
2 So I would propose that we reconvene on, let's say, the
3 afternoon of Monday, December 20th. Does that make sense? At
4 2:30 as well, Mr. Denton?

5 MR. DENTON: That's fine with the government, your
6 Honor.

7 THE COURT: Mr. Schulte?

8 MR. SCHULTE: No problem.

9 THE COURT: All right. So we'll reconvene on December
10 20th at 2:30 p.m.

11 I'll tell you what. What I will ask is that both
12 sides submit a letter to me the Thursday prior to that
13 conference indicating any issues or items that you wish to
14 discuss at the conference. But that will help me in setting an
15 agenda. Again, Thursday before the conference, so by Thursday
16 the 16th, each side should submit a letter to me along the
17 lines of the status letter that I invited before this
18 conference and just telling me anything that you wish to
19 discuss.

20 The last item is speedy trial. There are some pending
21 motions, so it may be that time is automatically excluded, but,
22 Mr. Denton, is there any application on that front?

23 MR. DENTON: Yes, your Honor. Although time is
24 automatically excluded in light of the defendant's stated need
25 to continue reviewing discovery in order to ensure his fair

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1 preparation for trial and the unusual complexity of this
2 matter, including pretrial litigation, we would ask that time
3 be excluded until the trial date of May 23, 2022.

4 THE COURT: Mr. Schulte? Any objection?

5 MR. SCHULTE: I would prefer to just exclude time
6 until the next pretrial conference and then move from there.
7 I, I -- I don't know how the Court usually does it, but I
8 prefer the smaller increments of time at a time.

9 THE COURT: All right. Very good. That probably
10 makes sense in the first instance, which isn't to say that it
11 wouldn't be justified through the trial date. But since we
12 will be reconvening, I'll exclude time between today and
13 December 20th. To the extent that it's not automatically
14 excluded already by virtue of the motions, I find that the
15 interests of justice served by excluding that time outweigh the
16 interests of the defendant and the public in a speedy trial, to
17 allow the parties to continue briefing the issues that need to
18 be briefed, the defendant to continue reviewing discovery, and
19 making sure that he has access to all the discovery that he
20 needs, and for me to consider the issues that are still under
21 advisement.

22 Anything else, Mr. Denton?

23 MR. DENTON: Not from the government, your Honor.

24 THE COURT: Mr. Schulte?

25 MR. SCHULTE: No.

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1 THE COURT: All right. Then I thank everybody for
2 their patience and help today, and we are adjourned.

3 (Adjourned)
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